

**UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
REGION 2**

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| THE NEIMAN MARCUS GROUP, INC., d/b/a | : |
| BERGDORF GOODMAN | : |
| | : |
| Employer | : |
| | : |
| and | : |
| | : |
| LOCAL 1102 RETAIL, WHOLESALE | : |
| DEPARTMENT STORE UNION | : |
| | : |
| Petitioner | : |
| | : |
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Case No. 02-RC-076954

**EMPLOYER'S BRIEF IN SUPPORT OF ITS REQUEST THAT THE BOARD
REVERSE THE REGIONAL DIRECTOR'S DECISION AND DIRECTION OF
ELECTION**

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The Neiman Marcus Group, Inc., d/b/a Bergdorf Goodman (“Bergdorf Goodman” or the “Employer”), by its undersigned counsel, submits this brief in support of its request that the Board reverse Regional Director Karen Fernbach’s May 4, 2012 Decision and Direction of Election,¹ in which she found that the unit petitioned for by Local 1102 of the RWDSU (“Local 1102” or the “Union”), consisting of “[a]ll full-time and regular part-time women’s shoes associates in the 2nd Floor Designer Shoes Department and in the 5th Floor Contemporary Shoes Department employed in the Employer’s retail store located at 754 Fifth Avenue², New York, New York,” is appropriate. The Decision and Direction of Election should be reversed because a substantial question of law and policy is raised by the Decision in that it departs from officially reported Board precedent and because the Regional Director made significant factual findings that are unsupported by the record, thereby prejudicially affecting the rights of Bergdorf Goodman, and forcing employees to participate in an election in an inappropriate unit.

In her unprecedented finding that two non-contiguous selling departments in a multi-department retail clothing store constitute an appropriate unit, the Regional Director’s Decision incorrectly found, inter alia, that:

- the employees in the 2nd and 5th floor shoe departments at 754 Fifth Avenue share a community of interest with each other, but do not share an overwhelming community of interest with other sales employees;
- there is little functional integration in the store as employees do not go to other departments with any frequency or regularity; and
- the presumption that a store-wide unit is appropriate has been rebutted in this case.³

¹ Citations to pages in the Decision and Direction of Election are “Decision at ____”

² The petitioned-for employees work on separate floors of the 754 Fifth Avenue location. As will be discussed below, the two Employer locations involved in this proceeding, which are across the street from each other, are operated as a single store, under a single store manager (Tr. 12-13). (Tr.) refers to pages from the official hearing transcript for the April 4, 2012, hearing.

³ As will be discussed below, in the few cases in which the Board has departed from a store-wide unit in a retail department store to find a unit of selling employees appropriate, the unit found appropriate has consisted of all selling employees, and not just the selling employees in one or two selling departments.

As fully discussed below, the Board should reverse the Regional Director's Decision because it ignored and misapplied controlling precedent. In addition, the Regional Director made findings that were either unsupported by, or contrary to, the testimony and documentary evidence admitted at the pre-election hearing. Contrary to the conclusions reached in the Regional Director's Decision, as the record testimony and controlling case law demonstrate, any unit that includes the petitioned-for employees must include, at a minimum, all other selling employees employed at the store, with whom the petitioned-for employees share an overwhelming community of interest.⁴ In the alternative, the Board should direct an election in a store-wide unit, including both selling and non-selling employees (with certain traditional exclusions to which the parties have already agreed), pursuant to the Board's longstanding doctrine that a store-wide unit is presumptively appropriate in the retail industry.

I. SUMMARY OF ARGUMENT

- A. Contrary to The Regional Director's Decision, The Board Has Never Found That A Separate Unit Of Shoe Salespeople Is Appropriate In A Multi-Department Retail Clothing Store; Moreover There Is Controlling Precedent That Such A Unit Is Not Appropriate For Bargaining**
- 1. No Board Precedent Supports The Regional Director's Holding That A Separate Shoe Department Unit Is Appropriate**

At page 17 of the Decision the Regional Director wrote the following:

It should be noted that shoe departments have been determined by the Board to be appropriate units. See *Allied Stores of New York, Inc. d/b/a Stern's, Paramus*, 150 NLRB 799, 803 (1965) (noting sales employees in

⁴ The Regional Director stated that the Employer argued for a store-wide unit, or in the alternative, for a unit consisting of all selling employees. (Decision at 2) That is also the way the Union's brief characterized the Employer's argument. This is not accurate. As will be discussed below, the Employer, at the hearing and in its brief, and consistent with Board precedent (including the recent decision in *Specialty Healthcare*), argued for a unit consisting of all selling employees because the shoe department sales people share an overwhelming community of interest with the other selling employees in the store. Only in the alternative did the Employer argue that an election should be held in a store-wide unit.

Saks Fifth Avenue's New York City shoe department were voluntarily recognized by that employer and constituted an appropriate unit).

With all due respect to the Regional Director, and as will be discussed in detail below, neither in Allied Stores, nor in any other decision the Employer is aware of since Bullocks, Inc., d/b/a I. Magnin & Co., 119 NLRB 642 (1957), (in which, as discussed below, the Board found a virtually identical shoe department unit to be inappropriate), has the Board ever found that, for election purposes, a retail shoe department was an appropriate unit for bargaining in a multi-department retail clothing store. The only comment the Allied Stores Board made concerning the shoe department at Saks Fifth Avenue was: "At Saks Fifth Avenue, shoe sales employees are represented by a collective-bargaining agent." Id. at 803. Moreover, the Board made this statement in the context of noting that, at times, New York-area retail stores voluntarily recognized unions in units that were less inclusive than the traditional wall-to-wall storewide unit. Specifically, the Board stated:

[i]ndeed, without resort to the election procedures available under this Act, retail department store employers and unions in the Metropolitan New York area have **voluntarily** entered into collective-bargaining agreements covering less than all store employees. Id. at 803. (emphasis added)

Thus, contrary to the Regional Director's assertion, there is nothing in the Allied Stores decision that can be construed as a holding that shoe department employees in a multi-department retail store constitutes an appropriate unit for bargaining.

2. The Regional Director Misconstrued And Failed To Follow Controlling Precedent

The Regional Director erred in finding the facts in the instant case distinguishable from the facts in Bullocks, Inc., d/b/a I. Magnin & Co., 119 NLRB at 642, a case involving a petition to represent a unit of sales employees working in four departments "devoted to the

selling of shoes,” which were on separate floors of the luxury retail store I. Magnin operated in downtown San Francisco. In that case, the Board dismissed the petition, finding that there was no reason to deviate from what was even in 1957 a longstanding Board presumption that “a storewide unit of all selling and non-selling employees” was an appropriate unit in a retail store. Id. As for “[s]maller units of retail clothing store employees,” the unanimous Board panel in Bullock’s/I. Magnin noted that such units are only appropriate “when comprised of craft or professional employees or where departments composed of employees having a mutuality of interests not shared by other store employees are involved.” Id.

As was the case with regard to the I. Magnin store, the record in the instant case is devoid of any evidence to support a finding that the petitioned-for employees are craft or professional employees. Similarly, with regard to the claim made in the Bullocks/I. Magnin case that the petitioned-for unit of shoe department employees shared a “mutuality of interests not shared by other store employees,” the Board held—in words that are equally applicable to the petitioned-for unit at Bergdorf Goodman—that was not the case with regard to the shoe departments at I. Magnin since:

All employees are hired through the personnel department and, while a different method of compensation obtains in the shoe departments,⁵ all salespeople work the same number of hours and enjoy the same benefits. Also, the skills employed by all the salespeople are of the same general type. The Employer does not require prior experience of all shoe department personnel and employees Shoe salesmen are not restricted to selling shoes but are encouraged to make sales of items throughout the store.⁶

⁵ As will also be discussed in detail below, the Regional Director’s decision relies heavily on the fact that shoe department employees at Bergdorf Goodman, as is common in the retail industry, are paid on a commission against draw basis (either a 9% or a 10% commission depending on the shoe department involved), while all other selling employees are paid on a salary plus commission basis. (Decision at 5, 13) In so doing, the Regional Director basically ignored the holding in Bullock’s/I. Magnin that such a difference should be given little weight.

⁶ 119 NLRB at 643. As will be discussed in detail below, all of the factors relied on by the Board in the Bullock’s/I. Magnin case in finding that the shoe salespeople did not enjoy a separate mutuality of interest apart from the very strong community of interest they shared with the overall retail selling and non-selling unit the Board found to be appropriate, are present in the instant case. Indeed, as will also be discussed, there are additional factors present in

B. The Applicability Of Specialty Healthcare⁷

The Regional Director improperly ignored the fact that the viability of retail industry cases finding that a store-wide unit or a unit of selling employees is appropriate, such as the Bullock's/I. Magnin case, was not disturbed or jettisoned by the Specialty Healthcare decision (or its progeny). That was explicitly recognized at footnote 29 of the Specialty Healthcare decision, where the Board stated that:

We note that the Board has developed various presumptions and special industry and occupation rules in the course of adjudication. Our holding today is not intended to disturb any rules applicable only in specific industries other than the rule announced in *Park Manor*.⁸

In that regard, it is notable that on May 31, 2012, the Board denied a union's Request for Review of a Regional Director's Decision and Direction of Election in Home Depot U.S.A., 20-RC-067144 (May 31, 2012). In doing so, the Board, in effect, affirmed the Regional Director's conclusion that there was sufficient functional integration between selling and non-selling employees in a retail setting to render the petitioned-for unit of only selling employees inappropriate. Significantly, the Regional Director in Home Depot U.S.A. relied upon Specialty Healthcare's guidance that a union cannot "fracture a unit, seeking representation in 'an arbitrary segment' of what would be an appropriate unit."

But even if the Board had not already denied the union's Request for Review in Home Depot U.S.A., the petitioned-for unit in the present case would still be inappropriate given that:

1. The petitioned-for employees share an overwhelming community of interest with all other selling employees (as well as with non-selling employees who are traditionally included in a single retail store unit).

the instant case that establish that the petitioned-for employees share an overwhelming community of interest with all selling employees in the store.

⁷ Specialty Healthcare and Rehabilitation Center, 357 NLRB No. 83, at * 1 (2011).

⁸ Id. at 13.

2. The petitioned-for unit is not a “readily identifiable” group of employees who share a community of interest. Rather, the proposed unit is an “arbitrary segment” of an appropriate unit and a “fractured unit” within the meaning of Specialty Healthcare and longstanding Board law. Indeed, the 5th and 2nd floor shoe department employees have less contact with each other than they do with selling employees from other departments in the store.
3. A direction of election in the proposed unit would lead to “an undue proliferation” of potential bargaining units at Bergdorf Goodman and in the retail industry in general given the typically large number of selling departments in a retail store (a total of 18 separate selling departments at Bergdorf Goodman).⁹

Finally, under established Board law, when a union is petitioning for a unit that is not presumptively appropriate, the union has the burden of presenting at least some evidence establishing the appropriateness of the unit.¹⁰ Here, the Union presented a single witness, whose brief testimony basically consisted of unsupported subjective impressions, and did not even arguably satisfy the Union’s minimal burden in this case.

For all of the foregoing reasons, the Board should reverse the Regional Director’s Decision and Direction of Election, and dismiss the petition.

II. STATEMENT OF THE CASE

On March 20, 2012, the Union filed a petition to represent a unit of:

All full-time and regular part-time women’s shoes associates in the 2nd Floor Designer Shoes Department and in the 5th Floor Contemporary Shoes department employed in the Employer’s retail store located at 754 Fifth Avenue, New York, New York.

Excluded from the petitioned-for unit were all other employees, including selling and non-selling employees traditionally included in store-wide and all-selling units in the retail industry. One of these exclusions was the selling employees of the two Men’s shoe departments.

⁹ Employer Exhibit 1; Tr. 14-15

¹⁰ Allen Health Care Services, 332 NLRB 1308 (2000).

A hearing was held on April 4, 2012. At the hearing, the Employer presented extensive testimony from two witnesses, Bill Brobston, and John Marazio. Mr. Brobston has been Senior Vice President and General Manager of the Bergdorf Goodman store at issue in this proceeding for the past 13 years. (Tr. 12-13) Mr. Brobston started his employment at Neiman Marcus as a sales associate in 1975, and held a variety of positions at Neiman Marcus prior to becoming store manager for the Bergdorf Goodman store at issue in this proceeding. (Tr. 13) Mr. Marazio, after working at Saks Fifth Avenue for three years, joined Neiman Marcus in 1989, and became Vice President of Human Resources at Bergdorf Goodman in 2006. In 2010, Mr. Marazio became Vice President of Human Resources at Neiman Marcus, while continuing to perform the job duties of the Vice President of Human Resources for Bergdorf Goodman. (Tr. 113-114)

In contrast, the Union presented a single witness, Dominic Sgambellone, who testified briefly, and provided no objective testimony that would support the Union's unit position. (Tr. 141-159)

At the hearing, the parties were able to reach agreement as to a number of job classifications that should be excluded from any unit found to be appropriate: loss prevention, carpenters, visual, housekeeping, restaurant employees, alterations, and guards and supervisors as defined in the Act. (Tr. 166)

On May 4, 2012, the Regional Director issued the Decision and Direction of Election.

On May 18, 2012, the Employer filed a Request for Review of the Regional Director's May 4, 2012 Decision and Direction of Election. On May 30, 2012, the Board granted the Employer's Request for Review.

III. FACTS

A. Background

Bergdorf Goodman is a luxury retailer, which operates a retail store on Fifth Avenue in Manhattan. (Tr. 12) The store consists of a Women's Store, located at 754 Fifth Avenue, and a Men's Store, located just across the street at 745 Fifth Avenue. (Tr. 12) The Women's Store has eight selling floors, and the Men's Store has three selling floors. (Tr. 14) The Men's Store previously was located on two floors of the Women's Store. The new Men's Store began operation in 1991 because there was a shortage of selling space in the Women's Store, and because of the opportunity for increased sales from the expanded space. (Tr. 13-14) Approximately 20 percent of the Women's store customers also shop in the Men's store. (Tr. 19)

B. Management Structure

As noted, a single store manager, Bill Brobston, is responsible for the two locations, which are operated as a single store. Bergdorf Goodman is part of the Neiman Marcus Group, which is headquartered in Dallas. Mr. Brobston reports to a Neiman Marcus EVP, Neva Hall, who is located in Dallas.

Mr. Brobston has four direct reports: the Vice President of Operations, and three Directors. The Vice President of Operations has responsibility for both locations of the store. The three Directors each have responsibility for part of the operation. One Director has responsibility for the Men's store, including the two Men's shoe departments, while two Directors split the Women's Store between them. It is noteworthy that one Director has responsibility for the 2nd floor Shoe Salon, while a different Director has responsibility for the 5th floor Contemporary Shoe Department. (Decision at 3; Tr. 17-18)

Reporting to the Directors are Department Managers and Floor Managers, who each have responsibility for one or more departments in the store. For example, the managers with responsibility for the 2nd floor Shoe Salon report to one of the Directors, while the managers with responsibility for the 5th floor Contemporary Shoe Department report to a different Director. (Tr. 17-18; Employer Exhibit 1) In addition to common supervision of both petitioned-for and excluded departments at the Director level, there is also common supervision of petitioned-for and excluded selling departments at the Department Manager level. An example of this involves the petitioned-for 5th floor Contemporary Shoe Department, since the Department Manager for this department is also the Department Manager for the Contemporary Sportswear (Ready-To-Wear) Department.¹¹ (Tr. 19) On Sundays, when fewer managers are assigned, the managers are “officers on duty,” and have responsibility for multiple departments. (Tr. 19)

There is a Director of Human Resources for Bergdorf Goodman, who reports to Mr. Marazio, and has responsibility for both the Men’s and Women’s stores. Three HR Managers report to the Director of HR. They split up responsibility for the employees (both selling and non-selling). (Tr. 115) One of the HR Managers has responsibility for a number of selling departments plus all of the non-selling stock associates in the store. (Tr. 115) There are also two Training Managers and an HR Coordinator who report to the Director of HR. (Tr. 115)

Hiring decisions at the store are made by the Human Resources department, the Director with responsibility for the department being hired into (who is one of the Store Manager’s direct reports), and by the Manager with responsibility for that department. (Tr. 120)

¹¹ This common supervision of part of the petitioned for shoe sales people with the employees in another department was not noted in the Regional Director’s Decision.

C. Selling Departments/Selling Department Employees

Employer Exhibit 1 lists all of the selling departments at Bergdorf Goodman, and provides the number of selling employees in each department. The selling employees are made up of 372 sales associates, including personal shoppers, as well as 41 selling assistants. (Tr. 81-82; Employer Exhibits 1 and 8) Each of the sales associates other than the personal shoppers is assigned to a specific department, and is encouraged to sell in other departments (known as non-home base departments). Personal shoppers are assigned to a particular floor in the store: two to the 5th floor; eleven to the 4th floor; three to the 3rd floor; one to the 2nd floor; and one to the Men's Store, and sell throughout the store, in every department. Selling assistants are assigned to personal shoppers and to other sales associates who have big books of business, assisting these sales associates to enhance the services the sales associates provide for Bergdorf Goodman customers. (Tr. 27-28, 81-82; Employer Exhibit 8)

D. All Sales Associates, Including The Petitioned-For Employees, Have The Same Job Duties And Are Evaluated With Regard To Identical Factors

All sales associates have the same job duties at Bergdorf Goodman, regardless of where they are assigned in the store. As Mr. Brobston testified, all sales associates are responsible for the following job duties/activities:

- Attend morning meetings to gain merchandise product knowledge.
- Maintain stock assignment and treat all merchandise with care.
- Achieve monthly, seasonal, and annual sales goals.
- Greet and welcome customers.
- Make customer comfortable.
- Introduce yourself to customer.
- Ask questions to determine customer's wants/needs.
- Make appropriate merchandise recommendations based on customer feedback.
- Offer customer refreshments.
- Show customer appropriate merchandise.
- Discuss features and benefits.
- Suggest additional items inside and outside of your selling department.

- Escort the customer to other departments if they show an interest.
- Close the sale.
- Tell customer about promotions, in-store events, services.
- Thank customer and invite them back to Bergdorf Goodman.
- Capture customer email, phone number, and address in clientele system.
- Contact customer to ensure they are satisfied with purchases.
- Contact customer to inform them of new deliveries, upcoming promotions, and in-store events.
- Maintain ongoing relationship with customer educating them on all that Bergdorf Goodman has to offer.
- Support annual inventory count.
- Perform other duties as assigned in support of a seamless customer experience.
- Provide hassle free service to each customer by exceeding their expectations.¹²

While, as noted, most sales associates are assigned to a particular department, all sales associates are encouraged to sell throughout the store. Indeed, on a monthly basis, using the same form for each sales associate (Employer Exhibit 4) one of the factors that is tracked is each sales associate's "Out of home base selling percentage," which is the percentage of a sales associate's sales that are comprised of sales not in the sales associate's department, but in all of the other departments in the store. All of the other rating factors are identical for all sales associates. (Tr. 52-55; Employer Exhibit 4)

Personal shoppers, as noted, are assigned to a floor, not to a particular department, and sell throughout the store on a routine, every day basis.¹³ As Mr. Brobston testified, personal shoppers sell by appointment only, and often prepare for a customer appointment by pulling, with the assistance of the selling assistants, merchandise from all over the store to "wardrobe" a customer. Personal shoppers also walk the sales floor with customers, visiting multiple departments, to point out merchandise they think the customer will be interested in buying. (Tr.

¹² Tr. 21-25; Employer Exhibit 2. Note that while all of the sales associates having the same general skills was treated as a significant factor in the Bullock's/L. Magnin decision, it was not even remarked on by the Regional Director in the Decision. In addition, the Regional Director found that selling shoes "requires a distinct skill set from other sales associates," (Decision at 16-17) a finding that is unsupported in the record, and unsupported by prior Board decisions.

¹³ The Regional Director essentially dismissed this as a factor in making her unit determination.

26-28) The Union's one witness confirmed that personal shoppers (as well as other sales associates) frequently are in his department (the 2nd floor Shoe Salon) selling to customers. (Tr. 148)

E. More Than 21% Of All Sales At Bergdorf Goodman Are Made By Sales Associates Selling Outside Their Own Department

Bergdorf Goodman strongly encourages each sales associate to sell merchandise outside his or her home department, which, as noted, Bergdorf Goodman refers to as a sales associate's "home base." (Tr. 24) This strong encouragement has been notably successful. As Employer Exhibit 3 shows, more than 21% of all sales at Bergdorf Goodman are made outside the sales associates' home bases. As reflected on page 1 of Employer Exhibit 3, which is a document Bergdorf Goodman prepares in the ordinary course of business, and which was not prepared for the hearing, during the Fall 2012 season at Bergdorf Goodman (August 1, 2011 through January 31, 2012), Bergdorf Goodman sold \$269,070,113 worth of merchandise, of which \$56,773,794—21.1%—was sold by sales associates outside of their home base departments. During the Spring 2012 season, through March 24, 2012, the percentage of out of home base sales rose to 21.5% of the total sales for the store.

Employer Exhibit 3 provides the actual sales and percentages for each sales associate, tracking, on a department by department basis, precisely which departments they sold in during the course of the Fall 2012 season and through March 24 in the Spring 2012 season. Thus, for example, as reflected on page 3 of the exhibit, each of the sales associates in the 5th floor Contemporary Shoe Department (Home Base 524) sold a substantial amount of merchandise from the Contemporary Sportswear Department (Home Base 550) during the Fall 2012 season, with Home Base 550 sales accounting for 12.4% of one of the Contemporary Shoe

department sales associate's sales for that period. In fact, one Home Base 524 sales associate sold over \$42,341 in Home Base 550 during the Fall 2012 season. (Employer Exhibit 3)

As also reflected on page 3 of Exhibit 3, Contemporary Sportswear sales associates sell merchandise from the Contemporary Shoe Department as well as from other non-home base departments. Pages 7 and 8 of Exhibit 3 show that 2nd floor Shoe Salon sales associates also sell outside their department on a regular basis. Indeed, even the Union's one witness, who acknowledged that he was "encouraged" to sell outside his department (the 2nd floor Shoe Salon), but who said he chose not to do so, made 2.5% of his \$934,402 Fall 2012 sales outside his home base, a total of well over \$20,000 for the season. (Tr. 155-157; Employer Exhibit 3).¹⁴ Notably, Handbags accounted for \$209,696 of 2nd floor Shoe Salon sales associates' sales in the Fall 2012 season. (Employer Exhibit 3)

Employer Exhibit 3 also reflects substantial sales being made outside home base departments, including in the two petitioned-for departments, by sales associates from other departments, with many of these sales associates selling not only in the two departments that were petitioned-for, but in virtually every department in the store. Notably, over 170 of the more than 250 non-personal shoppers, non-Salon Shoe Women's Store Sales Associates (or approximately 70 percent) derived at least some sales revenue from the 2nd Floor Salon Shoe department in the Fall 2012. Similarly, already in the spring season, through March 24, 2012, with more than four months left to the season, nearly 55 percent of this same group earned some sales revenue from the 2nd Floor Salon Shoe department. Indeed, as reflected in Employer

¹⁴ Including the Spring season through March 24, 2012, the Union witness, who, as noted, testified that he does not sell outside of his own department, even though he admitted he was encouraged to do so, has already sold more than \$28,000 worth of merchandise from other departments, with more than four months left to the year. (Tr. 157; Employer Exhibit 3) Note that the court reporter repeatedly recorded the amount of the Union witnesses' out of home base sales as \$2,800, even though the testimony, confirming the information provided in Employer Exhibit 3, was that those sales were \$28,000.

Exhibit 3, many sales associates reach double digit sales percentages outside of their home base department—10, 20 and even 30% in some cases.¹⁵ For example, over 10.2 percent, or \$190,515 of a Home Base 541 sales associate's sales were derived from the 2nd floor Shoe Salon in the Fall 2012. (Employer Exhibit 3)

Despite this overwhelming statistical evidence, and the anecdotal evidence presented by Mr. Brobston, the Regional Director inexplicably found that “there was no evidence employees go into other departments with any frequency or regularity.”¹⁶ This flies in the face of the evidence, and, in and of itself, supports a reversal of the Regional Director's Decision.

As reflected in the inter-departmental selling results documented in Employer Exhibit 3, Bergdorf Goodman, to an extraordinary degree, encourages sales associates to sell all over the store. This is confirmed anecdotally by Employer Exhibit 5, which consists of: (1) a report by a mystery shopper—someone who is retained to shop in the store so that he or she can report on the quality of customer service being provided by Bergdorf Goodman sales associates; and (2) excerpts from customer letters praising Bergdorf Goodman for the excellent service each customer received. (Tr. 57-59) The content of each part of Employer Exhibit 5 demonstrates that inter-selling is a high priority at Bergdorf Goodman. Here are two brief excerpts:

Stevie immediately took me out of Valentino's and off to another floor to look at Victoria Beckham. . . . He then took me to see dresses by Givenchy. . . . Finally he took me to Herve Leger. . . . Stevie was extremely helpful and he made me feel like I was shopping with a friend.

*

*

*

I do not have the card of the sales associate who helped me, but a woman in the Hermes department with curly blonde hair was extremely helpful, not only helping me to decide on a gift but then walking me

¹⁵ It is worthy of note that while sales associates from the two petitioned-for departments engage in some inter-selling in each other's departments, as a percentage of sales, they do more inter-selling in departments that were not petitioned-for, a factor that is not noted in the Regional Director's decision.

¹⁶ Decision at 20.

through several other departments in search of a specific style sweater that I was looking for.

F. Sales Associates From Different Departments Often Cooperate To Make A Sale, And Split The Commission On The Sale

Mr. Marazio testified that all sales associates at Bergdorf Goodman receive commissions on their sales. (Tr. 124-125) Mr. Brobston testified that when two sales associates from different departments collaborate on a sale they often split the commission. Thus, for example, if a sales associate from another department brings a customer to the 2nd floor Shoe Salon, and, with the help of a Shoe Salon sales associate, sells \$2,000 worth of shoes to the customer, the Shoe Salon sales associate would get his or her normal commission rate on \$1,000 and the sales associate from outside the Shoe Salon would get his or her commission rate on \$1,000. (Tr. 28-29)

G. All Sales Associates, Including The Petitioned-For Employees, Attend The Same Orientation And Training Programs

Every other week, Bergdorf Goodman conducts an orientation class for new employees. The orientation program lasts three to five days, and is attended by new sales associates, as well as by non-selling associates. In addition, all sales associates, including those in the petitioned-for departments, attend the same sales training program, a significant fact demonstrating the similarity of selling skills taught to petitioned-for and non-petitioned-for employees. (Tr. 122)

H. Selling Assistants Have Constant Contact With Sales Associates And Assist In Making Sales To Customers

As Mr. Brobston testified, Bergdorf Goodman has concluded that having selling assistants work closely with personal shoppers and other sales associates with big books of

business, serves to increase sales, as having selling assistants pull merchandise, etc., allows the sales associates to spend more time with the customers and enhance selling. Since personal shoppers and other sales associates sell all over the store, selling assistants routinely go into every department in the store to pull merchandise. (Tr. 26-33)

I. Selling Employees From Multiple Departments Attend Meetings Together On A Regular Basis

Once or twice a month, Bergdorf Goodman holds what are known as “All Seller” Meetings, which are attended by sales associate from the petitioned-for departments, as well as from all other selling departments, as well as by the selling assistants. (Tr. 22) Topics covered at those meetings include new policies, job performance, merchandise strategies, selling strategies and other topics. (Tr. 64)

In addition to the all seller meetings, there are designer meetings/clinics that are open to employees from multiple departments, including the two petitioned-for departments. In these meetings, a designer like Michael Kors will come to the store to talk about the designer’s latest collection that will be on sale in the store. It is common and important for sales associates from multiple departments to attend such meetings together. (Tr. 109-111) Another example is Christian Louboutin, whose shoe department meetings are widely attended by sales associates from non-shoe departments, as well, of course, by shoe department sales associates. (Tr. 111-112)¹⁷ Attendance at these designer meetings is important because learning and knowing the merchandise from a department other than a sales associate’s home base is essential to Bergdorf Goodman inter-selling efforts. (Tr. 110) As Mr. Brobston stated at the hearing:

. . . remember our mission is to serve a customer across a broad range of merchandise classifications. And it has been proven over and over

¹⁷ This interaction of petitioned-for sales associates with sales associates from other departments was not noted in the Regional Director’s decision.

again that the more merchandise classifications a seller sells, the more volume they'll do. So we encourage them to sell outside of their area, to learn about the product. (Tr. 110)

In addition to designer meetings, there are also vendor meetings, where vendor representatives other than the designer come into the store and train selling department associates with regard to the vendor's collection in the store. These meetings are also attended by selling department employees from multiple departments, including the petitioned-for departments. (Tr. 112) Bergdorf Goodman Buyers also hold meetings of this kind with selling associates. (Tr. 112) Finally, since new product comes in to the store throughout the year, there are as many as ten "product meetings" every morning, which all sales associates are encouraged to attend, either in their own departments, or, if there is no product meeting in their department, a product meeting in another department. (Tr. 21-22; Employer Exhibit 2)¹⁸

J. Bergdorf Goodman Provides I-Phones To All Sales Associates

Bergdorf Goodman provides I-Phones to all sales associates to aid selling efforts, and trains the sales associates on their use. The sales associates use the I-Phones to contact customers, and to send them pictures of merchandise they think the customers will want to buy. (Tr. 82)

K. Hiring Criteria Are The Same For All Sales Associates

There is no requirement at Bergdorf Goodman that sales associates have retail industry selling experience, although most hires have such experience. Similarly, there is no

¹⁸ The Regional Director essentially downplayed the many meetings attended by sales associates from multiple departments by giving undue weight to testimony from the Union's one witness that he, personally, did not often attend such meetings. (Decision at 11) There was no justification in the record for the Regional Director's failure to give the uncontradicted testimony of Bergdorf Goodman's witnesses concerning the large number of such meetings that are attended by sales associates from the petitioned-for departments as well as by sales associates from departments that were not included in the Union's petition. It is also noteworthy that the reason the Union's witness did not attend many meetings is that the meetings were usually morning meetings, and he worked a late shift (Tr. 142-143)

requirement that an applicant for a position selling shoes have retail shoe selling experience. (Tr. 120-121) All sales associates, indeed all employees serve the same probationary period. (Tr. 121)

L. All Sales Associates Are Paid Commissions, And Earnings Of Petitioned-For Employees And Other Sales Associates Are Comparable

Shoe department sales associates are paid a draw against commissions, whether they are in one of the petitioned-for departments, or in one of the Men's store shoe departments. This means that each week they are paid their draw, or what they earn in commissions, whichever is higher. Second floor Shoe Salon sales associates receive a 9 percent commission on their sales, while fifth floor Contemporary Shoe sales associates generally receive a 10 percent commission. In the two Men's store shoe departments the commission rate is the same, with some sales generating a 9 percent commission rate, and others a 10 percent commission. (Tr. 124) According to Mr. Marazio, the reason for paying the sales associates in the shoe departments a draw against commission is that it is the industry standard, which he knew first hand from the three years he worked at Saks Fifth Avenue. (Tr. 122-127)¹⁹

As Mr. Marazio testified, all other sales associates in the store are paid on a base salary plus commission basis, with commission rates generally being either 3 percent, 4 percent or 5 percent. (Tr. 125-126) Despite the different commission methodologies, earnings are comparable between petitioned-for and excluded selling departments. Thus, Mr. Marazio testified that there are selling associates who earn more than what 2nd floor Shoe Salon sales associates earn, and there are sales associates who earn less; and that there are sales associates

¹⁹ As will be discussed below, the shoe salespeople in the Bullock's/I. Magnin case were also paid a draw against commission, unlike other salespeople in the store-wide unit found to be appropriate, because it was the "industry standard." This difference in the method of compensation was given little weight in the Bullock's/I. Magnin decision and, inexplicably, great weight in the Regional Director's Decision here.

(including the 2nd floor Shoe Salon sales associates) who earn more than what the 5th floor Contemporary Shoe Department sales associates earn and that there are sales associates who earn less than 5th floor Contemporary Shoe Department sales associates. (Tr. 122-123)

M. All Sales Associates Are Subject To The Bergdorf Goodman Dress Code

All sales associates are subject to the Bergdorf Goodman dress code, which requires that sales associates be “presentable and professional and businesslike” at all times. (Tr. 117) Some differences in dress, based on the department in which a sales associate is working, with sales associates in the 5th floor Contemporary Shoe Department, the Men’s Sportswear Department, and Designer Sportswear having a more relaxed, casual dress code than the more formal dress required in other departments, including, significantly, the Women’s Shoe Salon on the 2nd floor. (Tr. 118)

N. All Sales Associates Receive Productivity Goals

All sales associates are given sales goals to achieve. (Tr. 23) Sales associate productivity is tracked on a monthly basis, and Department Managers meet with sales associates in every department, every month, to “review against what they actually did by month versus what they were goaled to do by month.” (127-128) Significantly, out-of-home base sales count toward the selling goals of all sales associates.

O. Employee Transfers Are Common Between: (1) Two Selling Departments; (2) Between A Non-Selling Department And A Selling Department; and (3) Between Two Non-Selling Departments

Employer Exhibit 6 is a non-exhaustive list of 42 transfers²⁰ between departments,

²⁰ There are 41 names of transferees on the list, one of whom transferred twice between selling departments, once in 2007 and once in 2010. Note that the Regional Director did not note in her Decision that this exhibit is a non-exhaustive list, which was not put together by reviewing the personnel files of the sales associates. (Tr. 67-74)

39 involving non-supervisory, non-managerial employees, 5 involving transfers into a petitioned-for department (two of which involved managers), with most of the transfers occurring in the past few years. The numerous transfers noted on the list, as well as Mr. Brobston's testimony demonstrate that such transfers are common, whether we look at transfers between two selling departments, between two non-selling departments, or between a selling department and a non-selling department. (Tr. 67-72)

P. Selling And Non-Selling Employees Attend Meetings Together, Work Together On A Regular Basis In Selling Departments, And Work On Annual Inventory Together

Once a month, for about an hour, selling and non-selling employees attend an all-store meeting, which is open to all employees, from both the Men's and the Women's store. (Tr. 64) All store meetings are mandatory for all associates, both selling and non-selling, who are scheduled to work and in the store at the time of such a meeting. (Tr. 111-112)²¹ Selling and non-selling employees also work together on annual inventory. (Tr. 25) Stock associates frequently work in selling departments with sales associates, who also have stock responsibilities. (Tr. 23)

Q. Selling And Non-Selling Associates Are Covered By The Same Policies And Receive Identical Benefits

Except for the housekeeping and alterations employees, who are represented by the Teamsters and UNITE, respectively, all non-selling and selling associates are covered by the same policies, and receive identical employee benefits. (Tr. 116-120) Thus, there is a single Employee Handbook, which applies to all employees, as well as a uniform application form.

²¹ The Regional Director gave some weight to the fact that the Union witness testified that he did not often attend these meetings because he was assigned to a later shift. Since the Union witness does not attend many of these meetings he was not in a position to testify credibly about who does attend these meetings.

(Tr. 116, 119) All employees are covered by the same disciplinary policies, and six-month probationary period. (Tr. 117, 121) All employees have personal lockers in the store, and have access to the employee cafeteria (located in the Women's store). (Tr. 115-116)

All employees enjoy identical medical and dental coverage, have the same vacation entitlement, holidays, 401(k) savings plan, and can purchase merchandise at Bergdorf Goodman sample sales. (Tr. 117-119) In fact, there is not a single benefit at the store that is not enjoyed by all selling and non-selling employees. (Tr. 117) The only difference, and it is a minor one, is that full-time selling employees are scheduled to work 38.75 hours per week, while full-time non-selling employees are scheduled to work 37.5 hours per week. (Tr. 116)

IV. THE REGIONAL DIRECTOR DISREGARDED CONTROLLING BOARD LAW AND IGNORED CLEAR AND UNCONTROVERTED EVIDENCE IN FINDING THE PETITIONED-FOR TWO-DEPARTMENT UNIT IS APPROPRIATE

A. The Regional Director Erred in Finding The Petitioned-For Non-Contiguous, Multi-Department Shoe Unit Is Appropriate Under Established Board Law

As noted in the summary of argument discussion of the Bullock's/I. Magnin decision, a unit limited to the employees of non-contiguous shoe departments in a luxury store is not an appropriate unit for bargaining because of the very strong community of interest the shoe department employees share with other employees in the store, especially with other sales people. Not only are the facts in the instant matter basically "on all fours" with the facts in Bullock's/I. Magnin, but the I. Magnin store involved in that case was also a luxury retailer with a policy of "encouraging" sales employees to sell in departments other than their own. The following excerpt from the decision, except for the reference to bargaining history in I. Magnin's San Francisco store, could just as easily refer to Bergdorf Goodman's New York store as it did to the San Francisco store:

At its San Francisco, California, store . . . the Employer operates a retail clothing store. Depending on the season it employs between 900 and 1,100 employees, of whom between 265 and 363 are salespeople. . . . Each shoe department is located on a different floor All employees are hired through the personnel department and, while a different method of compensation obtains in the shoe departments, all salespeople work the same number of hours and enjoy the same benefits. **Also, the skills employed by all the salespeople are of the same general type.** The Employer does not require prior experience of all shoe department personnel and employees from other departments have been assigned to work as shoe salesmen. **Shoe salesmen are not restricted to selling shoes but are encouraged to make sales of items throughout the store.**

About 15 years ago, shoe department employees in the store now operated by the Employer were represented by the Petitioner for a period of approximately 3 years.²² . . . Shoe department employees in other retail establishments in the San Francisco area have been represented by the Petitioner on an association wide basis for about 20 years. . . .

The Board has long regarded a storewide unit of all selling and non-selling employees as a basically appropriate unit in the retail industry.²³ Smaller units of retail clothing store employees are appropriate when comprised of craft or professional employees or where departments composed of employees having a mutuality of interests not shared by other store employees are involved.²⁴ As appears from the above, however, the record herein fails to establish any craft or professional skills or status among the shoe salesmen and it does not show that the skills, duties, interests, and conditions of employment of those employees are sufficiently different from those of other employees to warrant their establishment in a separate unit or any other basis.²⁵ . . . We shall therefore dismiss the petition.²⁶ (emphasis added)

Realizing that Bullock's/I. Magnin appears on its face to be absolutely controlling precedent, the Regional Director sought to distinguish the case in the following paragraph:

I. Magnin . . . is distinguishable from the instant case. Particularly, the shoe employees in *I. Magnin* did not have skills separate from other salespeople and other salespeople were assigned to work as shoe salesmen. By contrast, the record showed that almost all shoe department employees at issue herein had prior experience in retail sales, and shoe

²² Footnote omitted.

²³ Footnote omitted.

²⁴ Footnote omitted.

²⁵ Footnote omitted.

²⁶ 119 NLRB at 642-643.

sales in particular. Moreover, there is no evidence that employees in other departments are assigned to shoe sales, or that shoe sales employees are assigned to other departments. Therefore, in the instant case, the necessary evidence of interchange that might lead to a conclusion that the groups should be together as it did in *I. Magnin*, is not present. (Decision at 21)

This conclusion by the Regional Director is unsupported in the record. There is no evidence that the skills required to sell women's shoes in a luxury store in San Francisco differ from the skills required to sell women's shoes in a luxury store in New York City. Moreover, those skills are sufficiently similar to the skills necessary to sell other merchandise at Bergdorf Goodman, just as they were to the skills necessary to sell other merchandise at I. Magnin. Consequently, there is no justification for carving out a separate unit of non-contiguous shoe departments from a larger unit of all sales employees, or all selling and non-selling employees.

As to the Regional Director's finding that there is no temporary interchange, this ignores the fact that there is constant interselling among selling departments. In that regard, not only do sales associates from other departments frequently bring customers to the shoe departments to sell them shoes, either on their own, or with the help of shoe department sales associates, shoe department associates, including the Union's one witness at the hearing, frequently sell in other departments. Employer Exhibit 3 documents just how substantial this interselling is. This interselling is the functional equivalent of temporary interchange. In addition to essentially ignoring this evidence, and as will be fully discussed below, in finding Bullock's/I. Magnin distinguishable, the Regional Director did not consider all the pertinent

factors that mandate a finding that the petitioned-for unit is inappropriate, and made findings about the selling of shoes that are unsupported in the record.²⁷

The fact is, the petitioned for employees do not have “a mutuality of interests not shared by other store employees.” Thus:

1. **The Skills Required Of Sales Associates Are Identical Regardless Of The Department In Which A Sales Associate Works And The Regional Director’s Contrary Finding Is Unsupported In The Record And Inconsistent With *Bullock’s/I. Magnin***

The Regional Director found that selling women’s shoes:

requires a distinct skill set from other sales associates due to the unique nature of the product they are selling. If a shoe is not sized appropriately for a customer, discomfort and possible knee, back and other physical injuries could result. The record establishes that the 2nd floor shoe department sales associates have been given distinct training and possess experience fitting customers properly for shoes. (Decision at 16 and 17).

These findings are unsupported by any record testimony. There is no evidence of shoe sales associates having special training; there is no evidence that sales associates in non-shoe departments do not have sufficient training to sell shoes; and there is no evidence of customers having discomfort, knee problems, back problems and other physical injuries because

²⁷ Although not cited by the Regional Director, the Board’s decision in Franklin Simon & Co., Inc., 94 NLRB 576 (1951) is distinguishable from the present set of facts. In Franklin Simon & Co., Inc., the Board found a unit consisting solely of shoe salespeople in a **leased department** to be appropriate. However, in reaching this conclusion, the Board noted that: (1) the shoe department was operated pursuant to a lease agreement, the terms of which stipulated that the lessee fixed the employees’ wages; (2) the shoe department employees were managed by a supervisor that worked for the lessee; (3) the shoe salesmen worked six days per week while other store clerks worked only a five day week; (4) there was “no interchange of personnel between the shoe department and other departments...”; and (5) the shoe department manager could discipline employees without the approval of Franklin Simon, and “apparently makes temporary layoffs without consulting Franklin Simon.” Id. at 578-579.

The Franklin Simon & Co., Inc. decision predates Bullock’s/I. Magnin by six years. Notably, the Bullock’s/I. Magnin Board did not even cite to Franklin Simon Co., Inc. Moreover, unlike in Franklin Simon & Co., Inc. the Employer’s shoe departments are not operated under a lease agreement. Further, the record in the instant case demonstrates that, unlike the employees in Franklin Simon, all sales associates, including shoe sales associates, work the same number of hours per week. (Tr. 116) In addition, for the reasons discussed above pertaining to interselling, there is a great deal of interchange of personnel at Bergdorf Goodman, while there was none at Franklin Simon.

of non-shoe department sales associates fitting and selling shoes. As reflected in the Decision, the Regional Director based her finding of special shoe-selling skills solely on the following:

Sgambellone [the Union witness] testified that shoes are difficult to sell and that he tries to fit shoes correctly to avoid hurting the customer. He cited bunions, knee problems and back problems among injuries that could result from improper shoe fitting. Sgambellone also testified that associates from other department, who are not trained in shoe sales, sell shoes incorrectly in his department. (emphasis added) (Decision at 13)

Based on testimony by a single sales associates, who provided no specific examples of anything he testified to, the Regional Director made the wholly unwarranted finding that sales associates from other departments do not have the requisite skills to sell shoes. Yet a substantial majority of sales associates from other departments do in fact sell shoes in Mr. Sgambellone's department, demonstrating that they do have the skills to sell shoes.

The fact is, as recognized by the Board in Bullock's/I. Magnin, the skills necessary to sell shoes are generally the same as the skills necessary in other selling departments. It is why Bergdorf Goodman does not require that applicants for positions in a particular department have experience selling the merchandise that is sold in that department.²⁸ In finding Bullock's/I. Magnin to be distinguishable, the Regional Director basically ignored this factor.

Again with all due respect to the Regional Director, there is no testimony in the record that sales associates from other departments are not trained to sell shoes. Nor is there anything more than Mr. Sgambellone's subjective testimony that "associates from other departments, who are not trained in shoe sales, sell shoes incorrectly in his department" in support of a finding that special skills are needed to sell shoes. (Decision at 13) As for the testimony about bunions, and knee and back problems, there is nothing in the record to support a finding that sales associates from other departments have ever caused such problems by the way

²⁸ It also explains why so many sales associates have transferred from one selling department to another in the store.

they fit and sell shoes. (Decision at 13), just Mr. Sgambellone's subjective observation that fitting shoes improperly can cause problems.

2. **Sales Associates In The Petitioned For Departments As Well As All Other Sales Associates Are Encouraged To And Do Sell In Departments Other Than Their Own**

The encouragement of inter-selling is extraordinarily strong at Bergdorf Goodman, as evidenced by: (1) the fact that over 21 percent of the sales in the store are out of home base department sales; and (2) the fact that such sales are tracked on a monthly basis, and that Department Managers speak to each sales associate every month about his or her out of home base sales. Despite this evidence, the Regional Director reached the following conclusions:

- the record indicates that employees generally sold within their own departments. In particular, 2nd floor shoe employees sold about 97.7% within their own department in both quarters and 5th floor shoe employees sold about 92% within their department (Decision at 19);
- there is no evidence that employees in other departments are assigned to shoe sales, or that shoe sales employees are assigned to other departments (Decision at 20); and
- there is no evidence on the record regarding the frequency of such sales by sales associates from other departments who have sold shoes. (Decision at 13)

In making these findings, the Regional Director disregarded evidence demonstrating that:

- Contemporary Sportswear sales associates sell merchandise from the Contemporary Shoe Department as well as from other non-home base departments on a regular basis (Employer Exhibit 3);
- the Union's one witness, who acknowledged that he was "encouraged" to sell outside his department (the 2nd floor Shoe Salon), but who said he chose not to do so, made 2.5% of his \$934,402 Fall 2012 sales outside his

home base, a total of well over \$20,000 for the season. (Tr. 155-157; Employer Exhibit 3);

- over 170 of the more than 250 non-personal shopper, non-Salon Shoe Women's Store Sales Associates (or approximately 70 percent) derived at least some sales revenue from the 2nd Floor Salon Shoe department in the Fall 2012 season. Similarly, in less than two months of the Spring season (February 1 to March 24, 2012), nearly 55 percent of this same group earned some sales revenue from the 2nd Floor Salon Shoe department (which refutes the Regional Director's finding that sales associates from other departments do not sell in the 2nd Floor Salon Shoe departments on a regular basis Employer Exhibit 3);
- sales associates from other departments often split commissions with shoe department sales associates when they collaborate on a sale (Tr. 28-29; and
- many sales associates reach double digit sales percentages outside of their home base department. (Employer Exhibit 3)

As for there not being "evidence in the record of the frequency of [out of department] sales by sales associates from other departments who have sold shoes," Employer Exhibit 3 provides compelling statistical evidence, giving the actual sales volume of other sales associates in both shoe departments. Moreover, testimony by Mr. Sgambellone that the average sale price of a pair of shoes in his department is about \$700 helps to determine the frequency of sales.

In that regard the Regional Director treated as significant the fact that Mr. Sgambellone testified that he lost money when he sold merchandise in other departments. Even if true, that is not significant or relevant. (Decision at 19-20) Sales associates are encouraged to sell in departments other than their own, and do so on a very regular basis with great success as Employer Exhibit 3 demonstrates. Bergdorf Goodman does not encourage them to sell in other departments only if each sale will be worth more than a sale in the sales associate's home department. Bergdorf Goodman simply requires them to sell in departments other than their

own, and carefully tracks how successful they are in doing so. In any event, if a sales associate from a shoe department already has a customer who indicates that she wants to buy something in another department, the sales associate will already have a customer who is ready to buy rather than having to wait for a new customer, making Mr. Sgambellone's testimony that he loses money on such sales highly suspect. Moreover, the average price for a pair of shoes at Bergdorf Goodman is \$700, while the average price of a handbag is more than double that (Tr. 152), which means that Mr. Sgambellone's subjective belief that he will be losing money if he sells in another department has to be taken with a grain of salt and, in any event, is irrelevant to the question of whether he is encouraged to and does sell in other departments. Mr. Sgambellone's protestations are irrelevant to the question as to whether shoe sales associates sell in other departments in light of the statistical evidence, which was inexplicably downplayed by the Regional Director.

In finding the petitioned-for unit to be appropriate, the Regional Director cited DTG Operations, Inc., 357 NLRB No. 175 (December 30, 2011) in which the Board found that the petitioned-for unit was appropriate because the employees in question shared distinct functions separate from, and did not interact with, other employees. The Regional Director found that there was "minimal crossover of shoe sales associates with other sales associates" (Decision at 16), a conclusion that is unsupported in and at odds with the record, as the statistical and anecdotal evidence overwhelmingly demonstrates that sales associates from all departments derive sales revenues from other areas of the store, thereby establishing a functional integration among all sales associates, including those in the petitioned-for unit. (Employer Exhibit 3) Accordingly, DTG Operations is not controlling in the instant case, and, as such, the Regional Director's reliance on that case is misplaced.

3. **Sales Associates In The Petitioned-For Departments Enjoy Identical Benefits To All Other Non-Bargaining Unit Employees In The Store**

As testified to by Mr. Marazio, and as found by the Regional Director, there are no differences in the benefits enjoyed by the petitioned-for employees and all other employees in the store. Indeed, the only minor difference of any kind is the slight difference in regular hours between selling employees and non-selling employees. (Tr. 116-120) With regard to the selling associates, there are no differences at all. (Tr. 116-120) The benefits enjoyed by the petitioned-for employees are identical to those enjoyed by every other selling employee. (Tr. 116-120) The Regional Director, as noted, acknowledged this, but gave this fact much less weight than did the Board in Bullock's/I. Magnin.

4. **Bergdorf Goodman Does Not Require Applicants For Sales Associate Positions To Have Experience Selling The Merchandise That Is Sold In The Department In Which The Applicants Will Be Working**

As was the situation in the Bullock's/I. Magnin case, applicants for positions selling shoes are not required to have prior experience selling shoes, just as applicants for positions in other departments are not required to have experience selling the merchandise that is sold in the department in which they are applying for work. Nevertheless, the Regional Director gave great weight to the fact that--

the record showed that almost all shoe department employees at issue herein had prior experience in retail sales, and shoe sales in particular. (Decision at 21).

In contrast, the Regional Director gave virtually no weight to her own finding that "[t]here is no requirement that sales associates have prior retail industry selling experience," (Decision at 5) and thus largely ignored the relevant inquiry: whether the Employer requires shoe department sales associates to have prior shoe selling experience. Contrary to the Regional

Director's conclusion, for purposes of this analysis the fact that most shoe department sales associates have prior experience selling shoes deserves little weight.

5. **Permanent Transfers Of Sales Associates From One Department To Another, Including Transfers Into The 2nd Floor Shoe Salon And Into The 5th Floor Contemporary Shoe Department Are Not Uncommon; "Temporary Transfers" Are Very Common**

a. **Permanent Transfers**

Transfers from one selling department to another are common at Bergdorf Goodman, demonstrating a strong community of interest among selling employees. Since there are also many transfers from non-selling departments into selling departments, there is also a strong community of interest binding selling and non-selling employees together.

b. **Temporary Transfers**

In the traditional sense, there are few temporary transfers in the store. But sales associates from all departments make sales in other departments on a regular basis—accounting for more than 21% of the sales in the store. As a practical matter, each time a sales associate leaves his or her assigned department and goes into another department to make a sale (or at least to try to make a sale), that employee is temporarily transferring into that other department. That is the nature of a luxury retail clothing store. While there is no way to determine just how many times a typical sales associate enters another department in the course of a day to try to make a sale, the huge volume of “out-of home base” sales, as documented by Exhibit 3, demonstrates that these temporary transfers between departments occur on a regular and routine basis, which, contrary to the Regional Director's conclusions, supports a finding of functional integration among all sales associates.

It is also worthy of note that neither previous recognition of the union as the bargaining agent for the I. Magnin shoe salespeople, nor the fact that a number of retailers in the San Francisco area recognized the union (through an association) as the bargaining agent for their shoe department employees, nor the extent of organization at I. Magnin by the union was given significant weight by the Board in the Bullock's/I. Magnin decision. At Bergdorf Goodman, there was no evidence of any previous recognition of Local 1102 or any other union as the bargaining agent for any shoe department employees. Moreover, the only mention of any recognition of a union as a bargaining agent for shoe department employees was testimony that shoe sales associates at Saks Fifth Avenue were represented by a union. But that recognition was voluntary (as the Regional Director correctly noted), and occurred at least 47 years ago.²⁹

As for extent of organization (organizing success), Section 9(c)(5) of the Act prohibits the Board from making "extent of organization" a controlling factor in a bargaining unit determination. This prohibition is affirmed at page 137 of the Board Outline of Law and Procedure in Representation Cases.³⁰

²⁹ As discussed in the Summary of Argument above, the Board noted in Allied Stores, 150 NLRB 799, 803 (1965) that:

Indeed, without resort to the election procedures available under this Act, retail department store employers and unions in the Metropolitan New York area have voluntarily entered into collective-bargaining agreements covering less than all store employees. . . . At Saks Fifth Avenue, shoe sales employees are represented by a collective-bargaining agent.

³⁰ See also Sears Roebuck and Co., 191 NLRB 442, 445 (1971), where the Board found that a unit consisting of all selling and non-selling employees was appropriate, rejecting the union's request for a unit to include employees working in a detached service building and an alternative unit consisting only of employees at the service building or retail store engaged in warehouse and sales supporting activities. While the Board's decision relied on a finding that there was common supervision of requested and excluded employees, that sales employees engaged in non-selling duties, and that there was significant contact between retail store and service building employees, it also noted the employer's argument that the alternative units sought by the union were "based on either the extent of organization or . . . an unawareness of the interrelationship between employees" at the store. That also appears to be the case in the instant matter.

6. **The Differences In Compensation Methods Between Shoe Department Sales Associates And Other Sales Associates Is Not A Significant Factor**

The Regional Director's decision placed heavy emphasis on the fact that "the employees in the petitioned-for unit are paid on a different wage scale than all other sales employees in the store," noting that "the petitioned-for unit is paid on a draw versus commission basis as opposed to the base plus commission basis applicable to all other sales associates." (Decision at 20). This is a difference without substantial significance under Board law. Indeed, the Board gave virtually no weight to the fact that the petitioned-for shoe department employees in Bullock's/I. Magnin were paid on an industry-standard commission basis, while other sales employees in the store did not receive commissions.

Moreover, the two cases the Regional Director cites in support of the weight she gave to the somewhat different compensation method in the shoe departments either support the Employer's position or are inapposite to the instant set of facts. In Sears Roebuck and Co., 178 NLRB 577 (1969), the union only sought to represent salespeople compensated solely on a commission basis rather than those paid on an hourly or salary-plus commission basis. Although these commissioned salespeople sold "big-ticket merchandise," the evidence showed that the non-commissioned salespeople also sold the same type of merchandise. Id. at 578. As such, the Board ruled that it was not "persuaded that these commission salesmen are a homogenous group of employees who may constitute an appropriate unit." Id. Therefore, implicitly, the distinction in compensation methods among salespeople was not a dispositive factor in determining the appropriate unit. Similarly, in J.C. Penney Co., 196 NLRB 708 (1972), the Board found a unit of automobile center servicemen, which specifically excluded the automobile center sales specialists, to be appropriate. The Board noted that "the sales specialists are primarily salesmen

who work in a separate air-conditioned enclosure, are paid a draw against commissions, have little contact with the service employees, and there is no interchange between the two groups of employees.” Id. at 709. By contrast, “[t]he service employees perform manual work in connection with the repair and maintenance of automobiles exercising varying degrees of mechanical skills...,[are] hourly paid, work in uniforms, receive special training at the Employer’s school, and perform no substantial selling function.” Id. Therefore, J.C. Penney Co. does not support the Regional Director’s heavy emphasis on the minor difference in compensation method because the distinction in that case was between service and selling employees, while in the instant case, the focus is solely on sales associates in various selling departments.

In sum, the fact that employees in the petitioned-for unit are paid a draw against commission while other sales employees are compensated on a base-plus commission basis is at most a minor factor, and it was inconsistent with Board precedent for the Regional Director to give this factor significant weight in determining that the petitioned-for unit is appropriate.

B. The Regional Director Erred By Finding That: (1) The Petitioned-For Employees Do Not Share An Overwhelming Community Of Interest With All Selling Employees; And (2) The Union Rebutted The Presumption That An Overall Store-Wide Selling And Non-Selling Unit Is Appropriate

1. The Petitioned-For Employees Share An Overwhelming Community of Interest With The Rest Of The Selling Employees In The Store

In addition to failing to follow, without justification, the controlling precedent of the Bullock’s/I. Magnin case, the Regional Director also ignored record testimony that establishes that the petitioned-for employees share an overwhelming community of interest with the rest of the selling employees. This renders the unit petitioned for inappropriate under the analysis set forth in the Specialty Healthcare decision. Moreover, given the very strong

community of interest shared by all selling employees in the store, an overall selling unit is an appropriate unit for bargaining even though it would exclude the non-selling employees who are normally grouped with selling employees in a store-wide retail unit.

In Wickes Furniture, 231 NLRB 154 (1977), Chairman Fanning and Member Jenkins held (with Member Murphy concurring) that the sales employees at Wickes' retail furniture store had:

a sufficiently distinct community of interest apart from other store employees to warrant their establishment as a separate appropriate unit. They are under separate immediate supervision, spend the large majority of their time on the selling floor initiating virtually all sales, alone receive commissions for their sales, and have minimal contacts with warehouse employees.

As was the case in Wickes Furniture, selling employees at Bergdorf Goodman share a sufficient community of interest separate and apart from the non-selling employees to warrant a finding that a separate selling unit is appropriate. The factors pointing to a separate community of interest (and an overwhelming community of interest among all selling employees) include: common supervision; identical job duties, which require identical skills to carry out; sales associates routinely selling throughout the store, not just in their home departments; identical terms of employment; identical benefits; all sales associates are paid commissions and are subject to productivity standards (sales goals); and attendance by all selling associates at meetings designed to enhance product knowledge and selling skills.

In addition, the Regional Director incorrectly found that the sales assistants do not have an overwhelming community of interest with other selling employees. In fact, this conclusion is inconsistent with the Regional Director's own factual finding that sales assistants will perform a sales function when asked by a sales associate, and the fact that the sales

assistants are constantly assisting sales associates in multiple departments during a typical work day. (Decision at 18)³¹

This is not to suggest that a traditional overall unit, including both selling and non-selling employees would not be appropriate. As the decision in Wickes Furniture recognized, and Member Murphy emphasized in her concurring opinion, when the facts dictate the Board will deviate from the presumption that an overall store-wide unit is always mandated in a retail store. While it is clear from the opinions in Wickes Furniture that an overall unit will normally be the only appropriate unit, there will be times, as in the instant case, where an all selling unit will also be appropriate. Significantly, in Wickes Furniture, and in other cases that have deviated from a store-wide unit, as far as we can determine the Board has never permitted a petitioning union carve out just a few selling departments, or a single selling department, except in the Franklin Simon case, which, as discussed, involved a single leased department where there was no interselling. Other than where a leased department is involved, deviation from a store-wide unit has only been permitted to carve out all selling employees, or all non-selling employees, or employees who have a craft, like tailors or display workers.

2. The Union Did Not Rebut The Presumption That An Overall Unit Of Selling And Non-Selling Employees Is Appropriate

The decision in Specialty Healthcare did not create a new community of interest test. Nor, as noted, did it abandon the Board's extensive precedent regarding appropriate units in the retail industry. Consequently, the extensive precedent holding that the only appropriate unit in a retail store is a wall-to-wall unit, absent evidence that the requested unit consists of employees who do not share a mutuality of interests with other employees, remains very much in

³¹ In addition, the Regional Director found that sales assistants "have an entirely different wage scale." (Decision at 19). However, as discussed above in Section (A)(6), this distinction carries little weight under controlling Board decisions.

effect. Bullock's/I.Magnin; May Department Stores Co., 97 NLRB 1007, 1008 (1951); Charrette Drafting Supplies, 275 NLRB 1294 (1985); Levitz Furniture Co., 192 NLRB 61 (1971); A. Harris & Co., 116 NLRB 1628 (1956). The Union did not provide any evidence to rebut this retail industry presumption.

In A. Harris, the Board set the following conditions under which it would find a subset of employees of a retail store appropriate; where the employees:

(a) are under supervision separate from other store employees; (b) perform substantially all of their work tasks in buildings geographically separated from those in which the bulk of the remaining employees of the Employer work; and (c) are not integrated, to any substantial degree, with employees in other divisions in the performance of their ordinary duties. Id. at 1632.

None of the A. Harris factors are present in this case with regard to the petitioned-for unit. There simply is no factor that supports the Union's claim that a unit consisting of the employees in two, non-contiguous shoe departments is appropriate. It is simply an effort by the Union to "fracture a unit, seeking representation in 'an arbitrary segment' of what would be an appropriate unit." Specialty Healthcare, 357 NLRB at *13 (quoting Pratt & Whitney, 327 NLRB 1213, 1217 (1999)). A similar attempt to fracture a unit was rejected by the Board in a 1973 case involving Saks Fifth Avenue, another luxury retailer.

In Saks & Co., 204 NLRB 24 (1973), a union petitioned for a segment of non-selling employees in the store. The Board dismissed the petition, finding a lack of community interest among the petitioned-for employees because, among other reasons, of the close similarity of working conditions and benefits, and the close contact between selling and non-selling employees, thereby constituting an operation that was "more closely integrated than other retail establishments." Id. at 25.

In Kushins and Papagallo Divisions, 199 NLRB 631 (1972), the Board held, contrary to the union's petition for smaller unit, that a store-wide wall-to-wall unit was appropriate. The company had four sales areas, three of which were operated by one of the employer's divisions, and one by another of the employer's divisions. Id. The union petitioned only for the employees working for the division with three sales areas. Id. Only the larger division's sales employees were paid on commission basis. Id. All other employees were hourly rated, and had store discounts and the same employee facilities. Id. The larger division manager could discharge smaller division employees. Id. The Board concluded that: "[h]ere the employees of both divisions are employed by a single corporate entity, and operations of the two divisions at the San Francisco store are performed in essentially the same manner as in a traditional department store. For this reason, consistent with our unit policy in department store cases, the unit must be broadened in scope to encompass all store employees." Id. at 631-632.³²

In Sears Roebuck and Co., 191 NLRB 398 (1971), the Board dismissed a union's petitions to represent various employees in the store (service station, warehouse, store dock area, and retail store). The Board found that the entire operation was functionally integrated and constituted a "homogenous grouping whose common supervision, uniform working conditions, and overlapping job functions within the framework of a substantially integrated set of operations require that they all be included together in a single bargaining unit." Id. at 406.

Finally, as noted in the Summary of Argument section above, on May 31, 2012, the Board denied the union's Request for Review of the Regional Director's decision in Home Depot U.S.A., Inc., 20-RC-067144, at *14-15 (November 18, 2011). In Home Depot U.S.A., the union petitioned for a unit that essentially was limited to selling department employees of a retail

³² Significantly, the Board did not consider the fact that some of the petitioned for employees were paid on a commission basis to be an impediment to finding a wall-to-wall unit to be appropriate.

store. The Regional Director of Region 20 found that there was sufficient functional integration between selling and non-selling employees to render the petitioned-for unit inappropriate. He directed an election in a wall-to-wall unit reasoning that:

Though the Board has found separate units appropriate in retail store settings where employees with selling versus non-selling duties otherwise also shared no other community of interest, see *Stern's Paramus*, 150 NLRB 799 (1965), as established, here, all of the Associates . . . are involved to some degree in the sales operations of the Employer and share an overwhelming community of interest. fn

Finally, it should be noted that the Board recently clarified in *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011) that in cases where a party contends that a “readily identifiable” group of employees, who share a community of interest, does not constitute an appropriate unit because of a lack of inclusion of additional employees, that the party so contending bears the burden of demonstrating an overwhelming community of interest among the employees Petitioner seeks to exclude and the petitioned-for unit. It should also be stressed that *Specialty Healthcare* restates that a petitioner cannot “fracture a unit, seeking representation in ‘an arbitrary segment’ of what would be an appropriate unit.” *Id.* at 13 (quoting *Pratt & Whitney*, 327 NLRB 1213, 1217 (1999))

The petitioned-for unit does not have a separate community of interest apart from the rest of the Employer’s non-supervisory employee . . . and the petitioned-for unit would be a fractured unit, an arbitrary grouping of employees in this retail store setting. For all of the above reasons, the only appropriate unit is a wall-to-wall unit of all of the non-supervisory, non-security guard employees.

fn. The Board has also held that a highly skilled, distinct and homogeneous departmental group of employees may constitute an appropriate unit in a retail setting, see *Foreman & Clark, Inc.*, 97 NLRB 1080 (1951), (finding that tailor shop employees were engaged in highly skilled work, distinct from the sales persons and will-call boys, constituting an appropriate unit on their own). Here, the petitioned-for unit of Associates does not share such characteristics in comparison to the Associates the Petitioner wishes to exclude, as all Associates share similar skill levels and training.

* * *

By failing to follow this controlling precedent, the Regional Director essentially reads footnote 29 in Specialty Healthcare, where the Board specifically stated that its decision was not intended to “**disturb any rules applicable only in specific industries,**” out of the

decision. (emphasis added) The Regional Director's reliance on Northrop Grumman Shipbuilding, Inc., 357 NLRB No. 163 (December 30, 2011) to support the conclusion that a less than wall-to-wall unit is appropriate also is unavailing. Northrop Grumman is distinguishable because the issue in that case was whether there are special rules applicable to "technical employees." However, "technical employees" are not a "specific industry," unlike the retail industry where the traditional presumption is that a store-wide unit of all employees is appropriate (except where all selling employees share a distinct community of interest).

In this regard, it is noteworthy that the Outline of Law and Procedure in Representation Cases has a number of sections that discuss retail industry units. There, at Section 15-254, the Outline notes the units that have been found to be appropriate in the retail industry notwithstanding the normal presumption of a store-wide unit being appropriate. Significantly, the list does not include shoe departments or any other individual selling departments in a retail clothing store. The units listed are: alterations department employees, bakery employees, carpet workroom employees, display department employees, grocery employees excluding meat department personnel, meat department employees, restaurant employees, and service department employees. This is further evidence that the Regional Director has issued an unprecedented decision.

Additionally, the Regional Director failed to credit the presumption that a storewide unit is appropriate, and misconstrued the presumption's exception set forth in Allied Stores of New York, Inc. d/b/a Stern's Paramus, 150 NLRB 799 (1965). In Allied Stores, the Board concluded there was sufficient evidence to rebut the presumption that a store-wide unit in the retail setting was appropriate. But in reaching that decision, the Board found three appropriate units: a restaurant unit; an all selling unit; and an all non-selling unit. The Board was

not faced, as is the situation here, with a request to carve out two non-contiguous selling departments as a stand-alone unit. That kind of fracturing of a larger, obviously appropriate retail clothing store unit has never been allowed by the Board.

In addition, in refusing to find that the petitioned-for employees share an overwhelming community of interest with all other sales associates, the Regional Director, as noted, found that “a smaller department of shoe employees has been found to be an appropriate unit.” (Decision at 23). The Regional Director does not provide a citation to a controlling case for this assertion. Instead, as noted, the Regional Director directs the reader to Allied Stores, where the Board simply noted in passing that the unit encompassing shoe department employees at Saks Fifth Avenue was voluntarily recognized. As noted, there was no finding in Allied Stores that a separate shoe department unit is appropriate. Thus, contrary to the Regional Director’s statement, there appears to be no post-Bullock’s/I. Magnin case in which the Board has found that a shoe department is an appropriate unit for an election. And, as noted, the Board reached the opposite conclusion in Bullock’s/I. Magnin on facts that are virtually indistinguishable from the facts before the Regional Director.

V. CONCLUSION

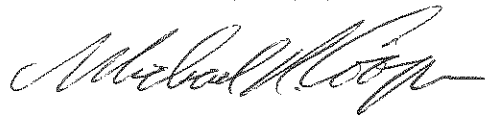
As the foregoing demonstrates, the Union has petitioned for a unit of employees who do not share a separate community of interest. The petitioned-for unit is a fractured unit, an arbitrary segment of what would be an appropriate unit—whether an all selling unit, or a wall-to-wall unit. The arbitrary cobbling together of two non-contiguous selling departments, on separate floors, of employees who share an overwhelming community of interest with the rest of the selling employees, is unprecedented. The two departments petitioned for simply do not share

a mutuality of interests not shared by other selling employees in the store, and, accordingly, do not constitute an appropriate bargaining unit.

Given the Employer's policies, and the way sales associates are encouraged and do sell all over the store, the Regional Director erred in finding the two departments petitioned for to be appropriate. Contrary to the Regional Director's conclusion, there are only two appropriate units that would include the petitioned-for employees: an all selling unit, or a store-wide wall-to-wall unit. Any other unit would be inconsistent with: (1) longstanding Board precedent; and (2) the Board's recent decision in Specialty Healthcare. Accordingly, the Employer respectfully requests that the Board reverse the Regional Director's Decision and dismiss the petition.

Respectfully submitted,

JACKSON LEWIS LLP

A handwritten signature in black ink, appearing to read "Michael R. Cooper", with a stylized flourish at the end.

Michael R. Cooper
Daniel D. Schudroff

Dated: June 13, 2012

CERTIFICATE OF SERVICE

I hereby certify that on June 13, 2012, I caused a true and correct copy of the foregoing Employer's Brief in Support of its Request That the Board Reverse the Regional Director's Decision and Direction of Election to be served via electronic filing through the National Labor Relations Board's website, www.nlr.gov, upon:


Lester A. Heltzer
Executive Secretary
National Labor Relations Board
1099 14th St. N.W.
Washington, D.C. 20570-0001

A copy was also served on counsel of record for Local 1102 Retail, Wholesale Department Store Union and the Regional Director for Region 2, via both electronic mail and Federal Express overnight mail at the following addresses of record:

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